"When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court.

Except for the offices of governor, lieutenant-governor, and members of the general assembly, such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such recount certificates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any contest or other preceeding [proceeding] in which there is an issue as to the votes cast at such election for such office or offices.

The 1961 amendment to § 5414 provides:

"The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted as herein provided for the purpose of referring the information therein contained to the appropriate authorities. [Acts 1945, ch. 208, § 337, p. 680; 1961, ch. 313, § 4, p. 861.]"

The United States Constitution provides that

"Each house shall be the judge of the elections, returns and qualifications of its members. . ." Article I, Section 5.

QUESTIONS PRESENTED

1. Whether the District Court had the power to enjoin the proceeding in the state court.

2. Whether the Indiana Election Code providing for a recount in elections for the office of United States Senator conflicts with the constitution prerogative of the Senate to judge the election of its members, thereby prohibiting a recount in this case.

STATEMENT OF THE CASE

On November 3, 1970, an election was held in the State of Indiana for the office of United States Senator. It was the closest senatorial election in Indiana history. The reported plurality was about one vote per precinct statewide. (4,482 votes; 4,440 precincts). Candidate Richard L. Roudebush petitioned the Marion County Superior Court for a recount in various enumerated precincts. Defendant R. Vance Hartke moved to dismiss Roudebush's petition, but the motion was denied and the petition for a recount of the votes was granted.

Appellee Hartke then filed in the District Court his Complaint for Injunctive Relief and Application for Temporary Restraining Order seeking to restrain operation of the recount statutes on the ground that they were in conflict with Article I, Section 5 of the United States Constitution. The same day Appellee's action in the District Court was filed, December 3, 1970, the judge granted the Temporary Restraining Order enjoining the defendant members of the recount commission from further proceeding.

On December 14, 1970, the Attorney General of Indiana moved to intervene as a party defendant pursuant to F.R.C.P. 24 in order to defend the constitutionality of the Indiana Election Code recount provisions. The Attorney General also moved the District Court to dismiss Appellee's complaint. On December 15, 1970, the District

Court granted the Attorney General's motion to intervene as a party defendant.

On December 17, 1970, the District Court three judge panel convened to hear Appellee's application for injunction based upon the unconstitutionality of the Indiana election recount statutes. The District Court determined the statutes to be unconstitutional with respect to the office of United States Senator. The District Court further found that to proceed with a recount "would work irreparable injury to the Plaintiff in that such action would compromise the integrity of the ballots, tally sheets, voting machines, and other paraphernalia of the election . . ." and ordered that the defendants and all those in active concert with them be enjoined from taking any action whatsoever pursuant to the provisions of Burns' Ind. Stat. Ann. § 29-5401 to § 29-5417 to conduct a recount. Appendix, p. A-2.

The Attorney General petitioned the district Court to stay its interlocutory order but was denied December 18, 1970. He then applied to this Court for a stay of the District Court order on December 18, 1970. This application was denied.

THE QUESTION PRESENTED IS A SUBSTANTIAL FEDERAL QUESTION

The legal issues involved in this case are truly substantial because the prerogatives of the United States Senate and the right of the State of Indiana to regulate its elections are involved. This case involves substantial questions of federal-state relations in the conduct of elections for Congress. The outcome of this case will decide which contestant shall be awarded a seat in the United States Senate. But the legal issues are of equal importance

and may well affect future Congressional elections in Indiana and other states where the voters show themselves to be so closely divided.

The first claim of Appellants is that 28 U.S.C. § 2283 prohibited the District Court from granting injunctive relief to Appellee. The District Court erred in granting injunctive relief interfering with the proceeding in the Marion County Superior Court. The injunction restraining the operation of the recount statutes was granted in contravention of 28 U.S.C. § 2283 which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments".

Despite the mandatory language, the district Court found this statute to be "a statutory adoption of the doctrine of comity and hence discretionary in its application". Citing *Baines v. City of Danville* (4 Cir. 1964) 337 F2d 579, the court said that "special circumstances" justifying relief would not prevent a federal court from enjoining state court proceedings, despite what the court acknowledged as the "absolute" language of § 2283. In *Baines,* Judge Haynsworth offered a thorough discussion of the past scope of § 2283. His discussion noted that § 2283 was derived from the Act of March 2, 1793, 1 Stat. 335, which simply provided that no injunctions should issue from federal courts to stay proceedings in any state court. In 1948, it was amended with the provision for the three exceptions to its operation. In *Amalgamated Clothing Workers of America v. Richman Brothers Co.* 348 U.S. 511, 514, 75 S. Ct. 452, 99 L. Ed. 600, (1955) the Supreme Court said "(b)y that enactment [the revision which is now § 2283], Congress made clear beyond

cavil that the prohibition is not to be whittled away by judicial improvisation". In *Baines,* the Court of Appeals said:

> "In every case before the Supreme Court in which federal interference with state court proceedings has been premised upon asserted denials of civil rights, the Supreme Court has required or sanctioned federal forbearance. It has usually done so on the basis of considerations of equity and comity fashioned by it, but which are identical with those which underlie the statute. If judicial principles of equity and comity prevent federal stay of criminal proceedings in a state court, it is difficult to see how an unqualified congressional command to the same end can be ignored". 337 F2d at p. 591.

In *Baines,* the court carefully decided that 42 U.S.C. § 1983, the civil rights statute, which provided for injunctive relief, did not make an exception to § 2283. Yet, reversing the tenor of its preliminary discussion, the Fourth Circuit, at headnote 14, commenced to fashion its rule that § 2283 is inapplicable in cases where an injunction against state court proceedings is the only means of avoiding "grave and irreparable injury". This conclusion was buttressed by a theory of expedience: "Judically fashioned rules are more malleable". 337 F2d at p. 593. However, upon the facts in that case the Fourth Circuit held that injunctive interference with the state court proceedings was not warranted.

Baines is readily distinguishable from this case, for *Baines* involved a violation of the First Amendment rights of the Negro plaintiffs. The instant case involved no claim under the Civil Rights Act.

While § 2283 does not bar federal injunctions against the *institution* of state court proceedings, *Dombrowski*

v. Pfister, 380 U.S. 479, 85 S. Ct. 116, 14 L. Ed. 2d 22 (1965), it bars all stays of proceedings already instituted unless one of the three statutory exceptions applies. The first exception in § 2283 is for cases where Congress has expressly authorized the federal courts to enjoin state court proceedings. But the Plaintiff here does not claim under any Congressional authority to enjoin state court proceedings. (Therefore cases using 42 U.S.C. § 1983 to carve out exceptions to § 2283 are not in point.) He is not proceeding under the Bankruptcy Act, in habeas corpus, or in removal. He seeks no injunction "Expressly authorized by Act of Congress". His only claim to jurisdiction is under 28 U.S.C. § 1343 (3) which provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • •
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; • • •"

This statute does not provide Plaintiff with an express authorization for the injunction. Nor is Plaintiff able to bring himself within the second exception allowing injunctions "where necessary in aid of [the federal court's] jurisdiction". The final exception in § 2283 permits federal injunctions against state court proceedings "to protect or effectuate its judgments". There has been no judgment justifying protection and conferring injunctive powers in this case. Thus, none of the statutory exceptions to § 2283 is available to Plaintiff. The District Court's avoidance of § 2283 is justifiable only upon its

theory that "special circumstances justify such relief . . ." Here there is no such justification at all.

The District Court clearly adopted the "special circumstances" test as to whether § 2283 should be avoided. The court rejected the theory of *Cooper v. Hutchinson*, 184 F2d 119 (3 Cir. 1950), that 42 U.S.C. § 1983 created an exception to § 2283 in granting the injunctive power to federal courts in civil rights cases. The *Baines* Case is the only authority cited by the District Court for its "special circumstances" test of the applicability of § 2283.

The District Court stated that abstention would not be proper where the state statute was clearly unconstitutional and incapable of a limiting construction. It cited *Harman v. Forsevius*, 380 U.S. 528, 85 S. Ct. 1177, 14 L. Ed. 2d 50, *Baggett v. Bullitt*, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 and others. But none of these cases involved § 2283 and its anti-injunctive imperatives. The cases cited were appropriate where abstention, as a general desideratum, was purely discretionary and not compelled, as here, by an act of Congress. The cases are inapposite here, because the abstention of the District Court is compelled by statute. In the cases cited, no pending state court proceeding was enjoined. Bereft of these cases not involving § 2283 and bereft of the *Baines* case, which involved a Civil Rights Act claim, the District Court's decision is an unsupportable extension of federal jurisdiction.

Appellant submits that if "special circumstances" can be considered an appropriate test for the circumvention of § 2283, that Congressional enactment has been rendered a practical nullity. Such an aggrandizing attitude towards federal jurisdiction must have as its basis a fundamental

distrust of the ability of state courts to adjudicate fairly federal constitutional issues. The vitality of federalism should not be permitted to be eroded by such flimsy justifications as "special circumstances", especially in cases where no First Amendment rights are involved.

In *Amalgamated Clothing Workers of America v. The Richman Brothers*, 348 U.S. 511, 75 S. Ct. 452, the Supreme Court considered a case where an employer had brought an action in a state court against a union which had been picketing its business outlets. The union then sought an injunction in a federal court to prevent the employer from pursuing his remedy in the state court, claiming that the state court had no jurisdiction over the labor dispute. The Supreme Court, assuming that the state court had no jurisdiction, held that a federal injunction was prohibited by § 2283. It had been argued that § 2283 was inapplicable whenever it appeared that the state court was wholly without jurisdiction to proceed, the field having been pre-empted by Congress. (This contention parallels the District Court's theory of "special circumstances" nullifying § 2283.) To this theory the Supreme Court replied:

> "This is not a statute conveying a broad general policy for appropriate *ad hoc* appliction. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions". 348 U.S. 515, 75 S. Ct. 455.

Against this clearly imperative language of the Supreme Court, the District Court in this case countered with the view that § 2283 was "discretionary in its application".

Subsequent to *Amalgamated*, this Court held in *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 116, 14 L. Ed.

2d 22 (1965) that it was proper for a federal court to enjoin the bringing of a state court proceeding where the threatened prosecution of the criminal statute would have a "chilling effect" on free speech, which would constitute an irreparable injury to the plaintiff. But *Dombrowski* did not involve § 2283 because the state court proceeding was enjoined before it had even begun, and § 2283 prohibits only injunctions against pending state court proceedings. Because § 2283 was not applicable in *Dombrowski*, that case is of no aid to Plaintiff here.

Following *Dombrowski*, several lower Federal courts have held that federal injunctive relief is warranted even where state court proceedings are pending *if* First Amendment rights are involved. Before it can be said that "special circumstances" exist which would enable a federal court to avoid § 2283, First Amendment rights must be involved. Moreover, the institution of the state court proceeding must be for the designed purpose of "chilling the First Amendment right". See eg., *Landry v. Daley*, 288 F. Supp., 200 (N.D. Ill. 1968) Federal intervention is not justified unless it is shown that enforcement of the state statute is being carried out in bad faith to harass an individual's exercise of protected freedoms. *Cameron v. Johnson* 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968); *Landry v. Daley, supra.* In *Cameron*, this Court said:

> "Appellants case that there are 'special circumstances' establishing irreparable injury sufficient to justify federal intervention must therefore come down to the proposition that the statute was enforced against them, not because the Mississippi officials in good faith regarded the picketing as violating the statute, but in bad faith as harassing appellants' exercise of protected expression with no intention of pressing the charges or with no expectation of obtain-

> ing convictions, knowing that appellants' conduct did not violate the statute. We agree with the District Court that the record does not establish the bad faith charged. This is therefore not a case in which '. . . a federal court of equity by withdrawing the determination of guilty from the state courts could rightly afford (Appellants) any protection which they could not secure by prompt trial and appeal pursued to this Court'. *Douglas v. City of Jeanette*, 319 U.S. at 164, 63 S. Ct. at 881"; 390 U.S. at 619, 88 S. Ct. at 1340.

There has been no allegation of bad faith in the attempted recount procedure, nor could there be. There has been no allegation of a denial of First Amendment rights. There is no way § 2283 can be avoided under the facts of this case. The facts of this case do not constitute a *Dombrowski* exigency.

Dombrowski involved the right of free expression—a right "of transcendent value to all society, and not merely to those exercising their rights . . ." 380 U.S. at 486. No such right of transcendent value is here involved. What is involved here is the right to discovery under the Indiana recount law to verify the vote count in an election conducted under Indiana law.

The terms of § 2283 themselves provide for three exceptions to its prohibitions. *Dombrowski* attempted to carve out another exception for threatened "chilling effects" upon First Amendment rights of expression. Since Plaintiff is unable to invoke any of these exceptions, § 2283 bars the District Court's injunction. In the absence of a First Amendment issue, there are no "special circumstances" justifying evasion of § 2283.

The District Court expressed its belief that "(l)ike Humpty Dumpty, the seals on the ballots cannot be put

back together again, if once destroyed, hence the frequent reason given for abstention—that all can be made right through state appellate procedures—does not apply". Yet all can be made right through state appellate procedures.

> "The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the "gap" complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts." *Amalgamated*, 348 U.S. at 518, 75 S.Ct. at 456.

In addition to the state case law which the District Court said favored Plaintiff, the recount statute provides for the maintenance of the integrity of the ballots.

> "The court shall by order impound, and provide for the protection of all ballots and voting machines used at such election for casting votes for such office or offices in such precinct or precincts, together with all tally sheets relating thereto and all lists of the names and addresses of all persons registered by the clerk as having voted for such office or offices, and shall make the same available to said recount commission or to any contest commission appointed pursuant to section 351(a)(b) and (c) of this act." Acts

1945, ch. 208, § 336, amended, Burns' (1969 Repl.) § 29-5413.

The District Court's fear of an "invasion of the sanctity of the ballots" is unfounded. Such an invasion could occur on the first count if it could occur on the recount. In any event, as the next argument will point out, the Senate retains its prerogative as the final judge of the election. Recount is largely a discovery procedure. Plaintiff will not suffer irreparable harm of the *Dombrowski* genre by a simple recount of the votes. Absent "special circumstances", § 2283 bars the District Court injunction. *Hayes Industries Inc. v. Caribbean Sales Associates, Inc.* 387 F.2d 498 (1 Cir. 1968); *International Association of Machinists v. United Aircraft Corp.*, 333 F.2d 367 (2 Cir. 1964).

There is no reason why Plaintiff should not have pursued his remedy in the Indiana Supreme Court by writ of prohibition. The three Indiana cases cited by the District Court as supporting Plaintiff's case all involved applications for writs of prohibition. There is no reason why Plaintiff could not have done likewise and secured a speedy remedy in prohibition. In *Dombrowski*, federal intervention was premised upon facts where it was certain the Plaintiffs would not be able to vindicate their constitutional rights in the state courts. It was said:

> ". . . a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." 38 U.S. at 486, 88 S.Ct. at 1120.

But in the instant case, Plaintiff has a clear, quick remedy in the Indiana Supreme Court by writ of prohibition and claims ample state authority for his constitutional claim.

There is no basis for *Dombrowski* federal action in this case, as there has been no irreparable injury. In general, "(s)tate officers may be enjoined, but only in a case reasonably free from doubt, and only if irreparable injury would result from the acts sought to be restrained. . . . Injunction should not be granted where other adequate remedies are available." 1 Barron and Holtzoff, Federal Practice and Procedure, § 46, p. 236-7.

The injunction was improperly granted because Plaintiff has failed to state a claim justifying relief.

Plaintiff has stated before the District Court the analogy that if a recount is invalid as to elections for seats in the state legislature, it is also invalid for the office of United States Senator. Under this reasoning, the 1961 amendment to § 29-5414, which made the results of a recount effective only to refer information to the appropriate authorities in recounts for the general assembly, should also apply to recounts for the Senate. Under the amendment to § 5414, recounts for the Senate would be excepted the same as state legislature recounts and the results of the recount would be of informational value only. There is no way that such a provision can derogate from the prerogatives of the Senate. In any event the Senate will have the final decision in the matter, Under Article I, Section 5.

While Article I, Section 5 of the Constitution establishes each house as the judge of the elections of its members, Article I, Section 4 provides that "(t)he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof . . ." Appellants submit that the Indiana recount statute is a valid exercise of

the power of the States to provide for the manner of holding elections, as it has simply made a recount an integral part of the election process.

A recount can be on no different footing than the original count. If a recount is defective as a derogation of the Senate's prerogatives, so is the original count. Were such to be true, the Senate would have to appoint a large staff to conduct the original count of the votes on the theory that the original count was in derogation of its rights to be the judge of the elections of its members. But that is not the case. The original count is not considered as an infringment upon the Senate's right; neither should be the recount. Article I, Section 5 clearly vests the Senate with the last voice. All a recount can do is refine the vote tally to a more accurate figure. The Senate can make whatever use of the tally it so desires. A recount serves as an integral part of the counting of the ballots and is merely part of the "manner" of holding the election, as provided for in Article I, Section 4. Since the States have the power to certify the results of a congressional election in the first instance, there is no reason why States cannot supersede this certification with a more accurate tally of the votes.

This view has received recent support in *Blackburn v. Hall* 115 Ga.App. 235, 154 S.E.2d 392 (1967); *Wickersham v. State Election Board,* 357 P.2d 421, Okl., (1960) and *Odegard v. Olson,* 264 Minn. 439, 119 N.W.2d 717 (1963).

Of the three Indiana cases principally relied upon by the District Court, the first two, *State ex rel Acker et al v. Reeves,* 229 Ind. 126, 95 N.E.2d, 838 (1951) and *State ex rel Beaman v. Circuit Court of Pike County et al,* 229 Ind. 190, 96 N.E.2d 671 (1951) both concerned elec-

tions for the state legislature, not the Senate. Moreover, they were decided prior to the 1961 amendment to § 29-5414, the last paragraph particularly, which explicitly limited the office of the recount to that of an informative function and nothing more. The one case decided after the passage of the amendment, *State ex rel Batchelet v. Dekalb Circuit Court et al,* 248 Ind. 48, 229 N.E.2d 798 (1967) contained such a short opinion that it by no means affords the Plaintiff so much support as claimed by the District Court. Moreover, *Batchelet* dealt with a moot case; the legislator had already been seated by the Indiana Senate. Appellants submit that if the Indiana Supreme Court were to hear this case today it would rule for the recount in view of the *Blackburn, Wickersham* and *Odegard* cases.

It should also be noted that the conclusive effects claimed for *Acker* and *Beaman* are undercut by two cases decided the same year which held that the duties of the recount commission are ministerial and the certificate of the recount commission is not an adjudication of the title to the office. *State ex rel McCormick v. Knox Superior Court*, 229 Ind. 118, 95 N.E.2d 829 (1951). A recount is in the nature of a bill of discovery. *Brown v. Grzeskowiak* 230 Ind. 110, 101 N.E.2d 639 (1951).

A recount should be distinguished from an election contest proceeding, which is provided for by separate statute. See Burns' Anno. Stat. (1969 Repl.) § 29-5501-5617. An election contest proceeding is more in the nature of an adjudication of title to the office contested. The laws of Indiana which provide for election contests on the basis of irregularity, ineligibility, illegal votes, etc. exclude contests for Congressional seats. Burns' § 29-5601. Whatever the conflict between an election contest and

Article I, Section 5 may be, there is no conflict as to a mere recount proceeding. Yet the District Court opinion uses the terms interchangeably at pp. 6, 7, and 15, (A-10, A-18) which further demonstrates the desirability of having this question of state law decided by a state court.

To summarize, the District Court erred because it granted an injunction prohibited by 28 U.S.C. § 2283 in a case involving facts which do not pose an exception, either statutory or judge-fashioned, to that statute. The District Court further erred because it granted relief to a Plaintiff who stated no claim justifying relief: a recount is not in derogation of the prerogative of the Senate to judge the elections of its members.

CONCLUSION

Appellants submit that this appeal brings before this Court truly substantial federal questions which require plenary consideration with briefs on the merits and oral arguments, for their resolution.

Respectfully submitted,

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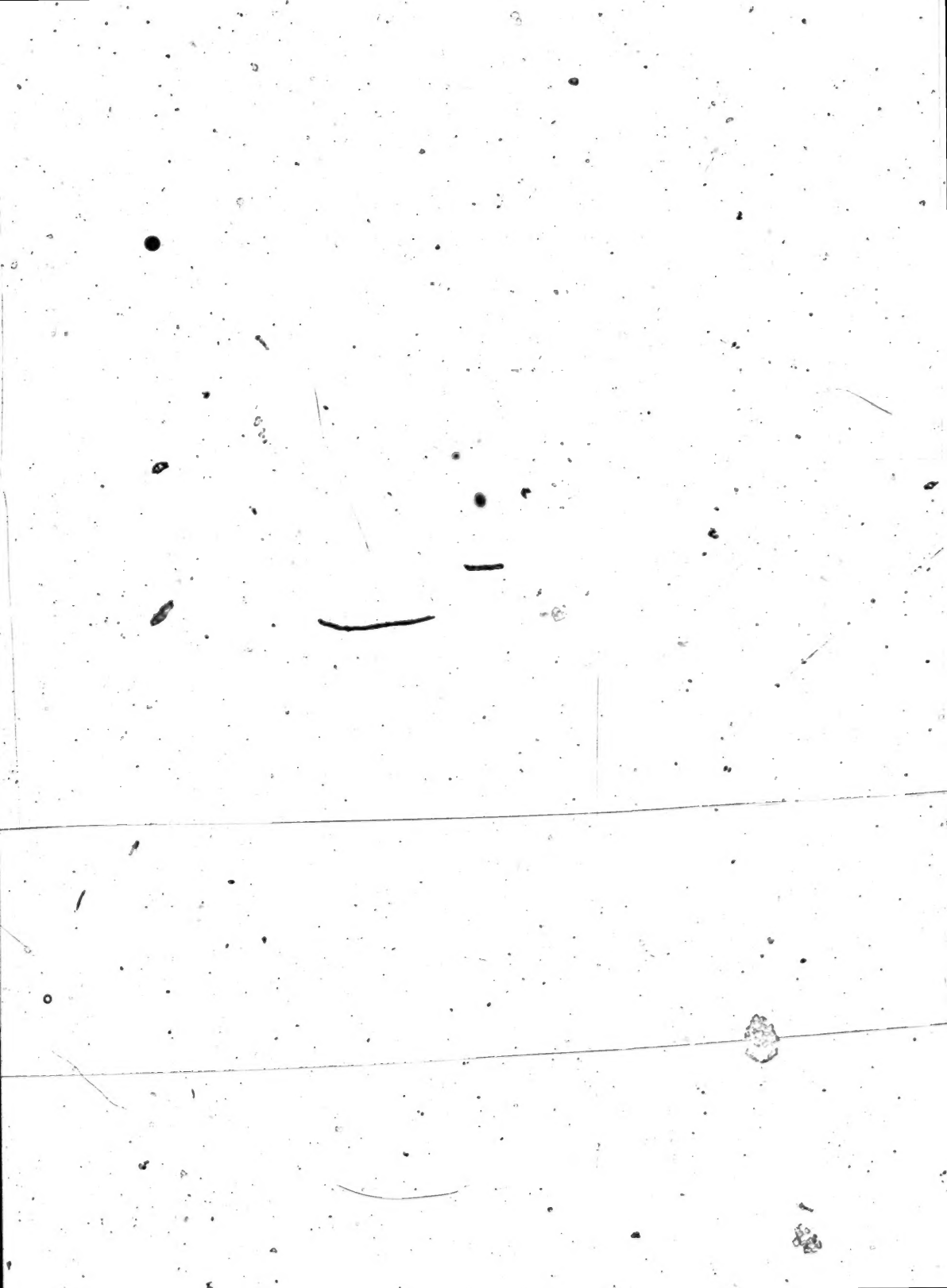
WILLIAM F. THOMPSON
Assistant Attorney General
MARK PEDEN
Deputy Attorney General
Attorneys for Appellant



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
vs	)	NO. IP; 70-C-694
	)	
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants,	)	
	)	
THEODORE SENDAK, Attorney General of Indiana,	)	
	)	
Intervening Defendant.	)	

PRELIMINARY INJUNCTION

This cause was heard before a three-judge District Court convened pursuant to 28 U.S.C. § 2284, on plaintiff's application for a repliminary injunction to enjoin the operation and enforcement of Chapter 54 of Title 29 of the Indiana Election Code, Burns Ind. Stat. Ann. § 29-5401 through § 29-5417, upon the ground that the application and operation of such statutes in respect to an election for the office of United States Senator is unconstitutional.

The Court having heard the evidence, and having considered the briefs and oral arguments of counsel, and

it appearing to a majority of the Court after due deliberation that the defendant Richard L. Roudebush has sought and will continue to seek a recount of the votes cast in certain counties of the State of Indiana in the general election of November 3, 1970, for the office of United States Senator for the State of Indiana, if not enjoined from so doing, and it further appearing that the defendants Samuel J. Walker, John R. Hammond, and Duge Butler will proceed to recount the votes cast for said office at said election in certain precincts of Marion County, Indiana, if not so enjoined; and a majority of the Court having made and filed its written opinion holding said statute to be unconstitutional with respect to such office, and finding that for said defendants to proceed with a purported recount in Marion County, Indiana, or elsewhere, would work irreparable injury to the plaintiff in that such action would compromise the integrity of the ballots, tally sheets, voting machines, and other paraphernalia of the election upon which plaintiff must rely to justify his certification of election to such office, in the event the defendant Richard L. Roudebush contests the same before the United States Senate, as he threatens to do, it is therefore

ORDERED, that the defendants Richard L. Roudebush, Samuel J. Walker, John R. Hammond, Duge Butler and their officers, agents, servants, employees and attorneys and all those in active concert or participation with them, be and they are each hereby restrained and enjoined from taking any action whatsoever under and pursuant to the provisions of Burns Ind. Stat. Ann. § 29-5401 through § 29-5417 to conduct a recount for the office of United States Senator for the State of Indiana in marion County, Indiana, or elsewhere, pending the determination of this action; provided, that plaintiff first give security in the

sum of $5,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, such bond to be approved by the court or by the Clerk of the court;

IT IS FURTHER ORDERED, that the United States Marshal serve a copy of this preliminary injunction upon each of said defendants and make his due return hereon.

Dated this 19th day of December, 1970, but effective as of December 17, 1970, at 5:45 P. M., pursuant to the oral announcement of the court's decision and order at the conclusion of the hearing on the prayer for a preliminary injunction.

/s/ WILLIAM E. STECKLER
William E. Steckler

/s/ S. HUGH DILLIN
S. Hugh Dillin

Judges, United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE, Plaintiff,	)	
vs	)	NO. IP 70-C-694
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER, Defendants,	)	OPINION
THEODORE SENDAK, Attorney General of Indiana, Intervening Defendant.	)	

This cause was heard before a three-judge District Court convened pursuant to 28 U.S.C. § 2284, on plaintiff's application for a preliminary injunction to enjoin the operation and enforcement of Chapter 54 of Title 29 of the Indiana Election Code, Burns Ind. Stat. Ann. § 29-5401 through § 29-5417, upon the ground that the application and operation of such statutes in respect to an election for the office of United States Senator is unconstitutional.

At the general election of November 3, 1970, the plaintiff, Vance Hartke, an incumbent United States Senator for Indiana, and the defendant Richard L. Roudebush were opposing candidates for Hartke's office. The

canvass reflected that Hartke received the highest number of votes cast for such office, and on November 16, 1970, the Secretary of State certified him to the Governor of Indiana as duly elected and the Governor, on December 3, 1970, gave to said candidate a certificate of his election, in the form required by Burns Ind. Stat. Ann. § 29-5309.[1] The certificate has been filed with the Secretary of the United States Senate.

On November 17, 1970, defendant Roudebush filed in the Superior Court of Marion County, Indiana, a petition for a recount of the votes cast in selected precincts of Marion County, stating in said petition his desire to contest said election. This court knows judicially that similar petitions were filed by him in ten other counties of the State of Indiana. The Superior Court of Marion County overruled a motion to dismiss the petition, and proceeded to appoint the defendants Samuel J. Walker, John R. Hammond, and Duge Butler as a recount commission to recount the votes cast for the office of United States Senator in such selected precincts of Marion County, rely-

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1 Section 29-5309. "The secretary of state as soon as he shall receive such certified statements, shall compare and estimate the votes given for United States senator and for representative in congress, and certify to the governor the persons having the highest number of votes as duly elected; and the governor shall give to each of the persons returned to him as aforesaid a certificate of his election, sealed with the seal, and attested by the secretary of state: Provided, That no return of any county which has come into its hands, and which has been duly authenticated by the clerk of the circuit court thereof, under seal, as hereinbefore provided shall be rejected by said secretary of state, but he shall estimate, aggregate and tabulate, and report to the governor the total number of votes cast in each county for each candidate for state office, supreme judge or other officer to be elected by all the voters of the state, and members of congress, as evidenced by the face of such returns so certified to him."

ing upon the Indiana recount statute, Burns Ind. Stat. Ann. §§ 29-5401—29-5417, the pertinent parts of which are set out below.[2] Said recount was ordered to be commenced on December 8, 1970.

On December 3, 1970, plaintiff Hantke brought this action to enjoin the defendant recount commission from proceeding with the recount in Marion County, and to enjoin the defendant Roudebush generally from taking further action to obtain a recount in the other counties in which his recount petitions were filed. Jurisdiction was

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2 Section 29-5401. "Any candidate for any public office voted upon at any election held within the state of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the conditions and in the manner and with the effect as in this article [§§ 29-5401—29-5417] provided."

Section 29-5402. "The right of recount provided in this article [§§ 29-5401—29-5417] shall be available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipal, county, district, judicial, legislative, and state elective office and candidates for membership in the house of representatives and in the senate of the United States; and such right of recount may by any candidate be exercised with respect to one [1] or several or all of the voting precincts in which votes were cast for the office for which he was a candidate."

Section 29-5405. "Each such petition shall state the office and the precinct or precincts within the county in respect of which the petitioner desires a recount; . . . that the petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that the petitioner desires to contest said election in respect of said office, . . . and that he desires a recount of all of the votes cast for such office in such precinct or precincts. The term 'contest' as used in this section shall include all forms

of contest herein or hereafter recognized as appropriate means for contesting title to a public office. . . ."

Section 29-5409. . :"Upon the filing of such petition and undertaking, the court or the judge thereof in vacation shall, upon the expiration of twenty-five [25] days after such election and upon proof of service of said notice or notices, grant such petition and cross-petition or cross-petitions as may have been filed and order the recount of such votes in such precinct or precincts . . ."

Section 29-5414. :"When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court.

"(Except for the offices of governor, lieutenant-governor, and members of the general assembly,) such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; . . ."

Section 29-5415. "If a recount is had in respect to an office for which votes were cast in all voting precincts of the state, (except governor and lieutenant-governor,) or in more than one [1] county, (except members of the general assembly,) the clerk of the circuit court where such recount was had shall determine whether the votes as shown by such recount certificates differ from the votes in such precinct or precincts as the same had been returned to, and tabulated by the county canvassing board, and if he finds there is such difference he shall make his certificate showing the total vote in such county for such office for each candidate as corrected in accordance with the votes shown by such recount certificate and shall forthwith transmit the same to the secretary of state . . . and if the secretary of state shall previously have included in his tabulations votes cast for such office as returned by such county canvassing board he shall correct such tabulation, . . . and the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office."

Note: Portions in ( ) added by 1961 amendment, as discussed *infra*.

predicated on 28 U.S.C. § 1343(3), with request that a three-judge district court be convened to hear the case, pursuant to 28 U.S.C. § 2284. The jurisdiction of a three-judge court over an action in which a candidate for the Congress of the United States alleges the deprivation of a right under color of a state election law, and the unconstitutionality of such law in the light of the Constitution of the United States has been recognized. *Voltaggio v. Caputo,* D. N.J., 1963, 210 F.Supp. 337, app.dis., 371 U.S. 232, 83 S.Ct. 325, 9 L.Ed.2d 494. See also *Socialist Labor Party v. Rhodes,* S. D. Ohio, 1968, 290 F.Supp. 983, aff'd as modified, *sub nom* Williams v. Rhoades, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24. This court was properly convened, and has jurisdiction in the premises.

The attorney General of Indiana has been permitted to intervene, pursuant to 28 U.S.C. §2284(2), and has filed a motion to dismiss the action. The defendant Roudebush has likewise moved to dismiss. An argument common to both motions is that this court lacks jurisdiction to grant injunctive relief, as prayed for, because prohibited by 28 U.S. § 2283.[3]

The statute referred to has been characterized as ambiguous, by the Supreme Court of the United States, speaking without dissent. *Leiter Minerals, Inc. v. United States,* 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267. It is therefore not surprising that various, and to some extent contradictory, interpretations of it have been made. One view, which we find persuasive, is that Section 2283 is not a jurisdictional statute, but is rather, in essence, a

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3. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

statutory adoption of the doctrine of comity and hence discretionary in its application. In spite of its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances justify such relief. *Baines v. City of Danville,* 4 Cir., 1964, 337 F.2d 579, 593. This appears to be particularly true with respect to cases arising pursuant to 42 U.S.C. § 1983, as to which 28 U.S.C. § 1343, under which this suit is brought, is the jurisdictional analogue. *Machesky v. Bizzell,* 5 Cir., 1969, 414 F.2d 283; *Carmichael v. Allen,* N.D. Ga., 1967, 267 F.Supp. 985 (three-judge court); *Landry v. Daley,* N.D. Ill., 1968, 288 F.Supp. 194, 233. See *Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22.

Another ground for dismissal urged by the defendant Roudebush is that this court lacks jurisdiction because exclusive jurisdiction to determine the effect of the recount proceedings commenced by him is in the United States Senate by virtue of Article 1, Section 5 of the Constitution of the United States, which provides "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." But a right claimed under the same Constitutional provision—the right to have the returns of the November 3 election judged by the Senate and not piecemeal by various commissions appointed by various state courts—is the very right which plaintiff asserts is being violated by the defendant Roudebush's state court actions. Regardless of the position taken, all parties agree as to the supremacy of the Senate itself to make the final determination as to the winner of the recent election. *Reed v. County Commissioners,* 277 U.S. 376, 48 S.Ct. 531, 72 L.Ed. 924; *Barry v. U. S. ex rel Cunningham,* 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867.

The great weight of authority supports plaintiff's position that court proceedings for recount or contest with regard to an election for representative in the national House of Representatives or for United States Senator are unconstitutional, as in conflict with Article 1, Section 5, whether brought in state or federal court. *State ex rel Fleming v. Crawford,* 1891, 28 Fla. 441, 10 So. 118; *Burchell v. State Board of Election Commissioners,* 1934, 252 Ky. 823, 68 S.W.2d 427; Opinion of the Justices, 1956, 152 Me. 212, 142 A.2d 532; *Belknap v. Board of Canvassers,* 1893, 94 Mich. 516, 54 N.W. 376; *McLeod v. Kelly,* 1942, 304 Mich. 120, 7 N.W.2d 240; *State ex rel 25 Voters v. Selvig,* 1927, 170 Minn. 406, 212 N.W. 604; *Odegard v. Olson,* 1963, 264 Minn. 439, 119 N.W.2d 717; *State ex rel McCue v. Blaisdell,* 1908, 18 N.D. 55, 118 N.W. 141; *Laxalt v. Cannon,* 1964, 80 Nev. 588, 397 P.2d 466; *Opinion of the Justices,* 1921, 80 N.H. 595, 113 A. 293; *Smith v. Polk,* 1939, 135 Ohio St. 70, 19 N.E.2d 281; *Sutherland v. Miller,* 1917, 79 W.Va. 796, 91 S.E. 993; *State ex rel Wettengel v. Zimmerman,* 1946, 249 Wis. 237, 24 N.W.2d 504; *Keogh v. Horner,* 1934, S.D. Ill., 8 F.Supp. 933; *Peterson v. Sears, et al.,* 1964, N.D. Iowa, 238 F.Supp. 12.

An equally strong body of authority supports the same rule with regard to the lack of jurisdiction in the courts to countenance suits for recount or contest with regard to elections of members of the State legislatures. The reasoning is identical and is predicated on provisions of the various state constitutions which copy Article 1, Section 5 of the Constitution of the United States either verbatim or in substance. We deem it unnecessary to burden this opinion with a collection of these many cases, inasmuch as the Supreme Court of Indiana has had occa-

sion to speak three times in the past twenty years on the subject of legislative recounts, attempted under the statute here involved, Burns Ind. Stat. Ann. §§ 29-5401—29-5417, inclusive.

This trilogy consists of the cases of *State ex rel Acker, et al v. Reeves,* 1951, 229 Ind. 126, 95 N.E.2d 838, *State ex rel Beaman v. Circuit Court of Pike County, et al,* 1951, 229 Ind. 190, 96 N.E.2d 671, and *State ex rel Batchelet v. Dekalb Circuit Court, et al.* 1967, 248 Ind. 481, 229 N.E.2d 798. The provision of the Constitution of Indiana which controlled the cases is Article 4, Section 10, which is virtually identical to Article 1, Section 5 of the Constitution of the United States.[4] In each case, a defeated candidate for the General Assembly of Indiana filed a petition for a recount pursuant to Burns Ind. Stat. Ann. §§ 29-5401—29-5417, in each case the trial court appointed a recount commission, and in each case the Supreme Court of Indiana issued a writ of prohibition restraining the court from proceeding with the recount on the ground that it was constitutionally impermissible in the light of Article 4, Section 10.

In order to understand *Acker, Beaman,* and *Batchelet,* and, for that matter, our own decision, it is necessary to make plain what the unadorned word "recount" has been taken to mean in Indiana. It will be noted immediately that the statute (Footnote 2) does not specify in what manner the recount shall be conducted; however, we find from the undisputed evidence in the case before us, and in addition know judicially, that by custom, usage and practice recounts in Indiana have been con-

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4 Article 4, Section 10: "Each House, when assembled, shall . . . judge the elections, qualifications and returns of its own members."

ducted under the statute as follows: (1) with regard to votes registered on voting machines, the machines are inspected by the commission, and the totals checked against the tally sheets and certificates of memoranda as to total votes cast for each office; this operation is purely mechanical and/or mathematical and creates no problems; (2) with regard to votes cast by paper ballot, which includes all of the votes cast in some of the counties of the State of Indiana and a part of the votes cast in all counties of the State, the commission exercises its own judgment, sometimes supplemented by instructions from the court which appoints it, as to which ballots are to be counted and which not counted, and thereby, for all purposes, nullifies and supersedes the judgment of the duly constituted election boards in this regard.

Further, the election laws provide that after tallying the vote, each local election board must place in separate envelopes, clearly marked, all of the ballots which it counted, and all of the ballots which it did not count. Such envelopes are then sealed with wax, to preserve their integrity. The commission necessarily breaks the seals and removes the ballots for the purpose of its recount—or rejudging, as would appear to be more accurate—and reassembles them according to its own determinations, which may well be by 2-1 vote in many instances.

There is no way in which the commission may make a simple mathematical verification of the vote. As illustrative of the problems encountered, a ballot may, under certain circumstances, be valid and countable for one office, but not for another. If counted for any office it is placed in the "counted" envelope; but the commission has no way of knowing how the election board counted it—whether for all offices, or only for some. The main problems, of course, arise with respect to the counting

of ballots not absolutely perfect on their face. What is a distinguishing mark? What was the intent of the voter? As the record in the many permissible recount cases, too numerous to cite, all reflect, judgments must constantly be made in determining which ballots to count and which not to count when "recounts" are made under the Indiana recount law.

It was in this context, then, that the Supreme Court of Indiana first confronted the constitutional question as to the jurisdiction of the Indiana courts to appoint recount commissions with respect to an election for a seat in the Indiana House of Representatives. The Court quoted Article 4, Section 10 Indiana Constitution and pointed out its similarity to Article 1, Section 5 United States Constitution. It then quoted with approval from *Lucas v. McAfee*, 1940, 217 Ind. 534, 29 N.E.2d 403, 29 N.E.2d 588, as follows:

> "'The right of legislative bodies to judge the elections, qualifications, and returns of their own members is of ancient origin. The history of the doctrine reveals that it was established in the constitutional law of England in the year of 1586, during the reign of Queen Elizabeth . . . .
>
> 'Provisions guaranteeing this right are to be found in the federal Constitution and in the organic law of every state in the Union, in language substantially if not identically like that employed in ours. . . . That right is deemed essential to the enactment of legislation without interruption and confusion and to maintain a proper balance of authority where the functions of government are divided between coordinate branches. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Con-

stitution has defined a domain upon which courts may not tread. *Dinan v. Swig,* 1916, 223 Mass. 516, 112 N.E. 91.' "

The Court then went on to hold the statute unconstitutional and void to the extent that it purported to apply to members of the General Assembly, and entered its writ of prohibition accordingly.

Beaman, like *Acker,* arose out of the general election of 1950, and was considered at about the same time by the same court. Here original suits were brought in two counties to obtain a recount for the office of Joint State Senator and recount commissions were appointed in each county. The judges of the two courts were again prohibited from proceeding with the recounts. On behalf of respondents, as in the case before us, the argument was made that in carrying out the provisions of the recount statute the courts and their commissions were acting simply in a ministerial capacity. The Court pointed out its recent decision in *Acker,* and held that since the recount statute was unconstitutional as applied to recounts for the legislature, it was, to such extent, void ab initio and inoperative from the time of its passage. Therefore, it reasoned, it could not confer any jurisdiction upon any court either for the performance of judicial or ministerial acts, and hence the appointment of recount commissioners was beyond the lawful jurisdiction of the courts involved.

Also, as here, respondents argued that a recount of votes is not an adjudication of the election or rights to an office but is only a proceeding in discovery. The Supreme Court rejected this theory also, pointing out the provisions of Section 29-5414, "*Such recount certificates shall supersede for all purposes all previous re-*

turns. . ." (Supreme Court's emphasis), and of Section 29-5415 , ". . . the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election . . . notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office." The Court concluded from such provisions that if the effect of the statute was not an adjudication of the election and returns of members of the legislature it approached so nearly thereto "that it may interfere with the constitutional right of each house of the Legislature to judge the elections and returns of its members. . . . its effect is more than a mere procedure for the discovery of evidence." Unconstitutionality was reaffirmed.

These decisions put the matter at rest for the next several years. However, in 1961 the General Assembly attempted to bring the law into conformity with the Indiana Constitution with respect to the members of the general assembly and certain other state officers. It did so by inserting the language "Except for the offices of governor, lieutenant-governor, and members of the general assembly" where the same presently appear in Sections 29-5414 and 29-5415 (set out in ( ), Footnote 2), and by adding certain paragraphs to Section 29-5414 to provide that with respect to the general assembly, the results of the recount would be forwarded to the appropriate presiding officer for information only. It will be noted that all of the language found in *Beaman* to constitute a recount "more than a mere procedure for the discovery of evidence" remained untouched as to recounts for the office of United States Senator.

However, the effort to legitimize recounts for the General Assembly failed. In *Batchelet* a recount for State

Senator was attempted in the DeKalb Circuit Court under the amended statute, and that Court appointed a recount commission. The recount was immediately halted by a temporary writ of prohibition issued by the Supreme Court of Indiana. The Senate itself then resolved the dispute, as provided by Article 4, Section 10. In thereafter making the temporary writ permanent, in stead of simply dismissing the proceeding as moot in light of the seating of Senator Batchelet, the Supreme Court again quoted from *Acker:* "(The) right of legislative bodies to judge the election, qualifications, and returns of their own members is of ancient origin. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread." The lower court was held to have no jurisdiction.

If, as cannot possibly be denied, it is unconstitutional under Indiana law for an Indiana Circuit or Superior Court to conduct a recount for the office of member of the General Assembly, even after the passage of the abortive 1961 amendments, *a fortiori* it is manifestly repugnant to the Constitution of the United States for such a court to attempt to conduct a recount for the office of United States Senator, as to which office such amendments were not even sought to be applied.

We now return to further discussion of the effect, or lack of effect, of 28 U.S.C. § 2283. At the outset, it will be noted that the section contains three specific exceptions which remove the statutory inhibition in certain circumstances. (Footnote 3). Obviously, if the suit at hand falls within one of the exceptions, no further discussion

is required. It has been urged in recent cases arising under 42 U.S.C. § 1983[5] and brought pursuant to 28 U.S.C. § 1343 that Section 1983 itself furnishes a specific exception applicable to Section 2283, in that it specifically authorizes relief by ". . . suit in equity, or other proper proceeding for redress." Indeed, it has been so held. *Cooper v. Hutchinson*, 3 Cir., 1950, 184 F.2d 119. in *Dombrowski, supra*, the Supreme Court found decision of this question unnecessary to its disposition of the case, and therefore declined to resolve it. It likewise specifically declined to resolve the question in *Cameron v. Johnson*, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182. The proposition therefore remains quite viable.

However, it is true that whether one takes the view of the Third Circuit as expressed in *Cooper* that Section 1983 constitutes a specific exception to Section 2283, or whether one takes the view we have adopted that notwithstanding Section 2283 a state court proceeding may be enjoined where special circumstances justify such relief, it does not follow that equitable relief will automatically be granted. Indeed, in some of the cases relied upon in support of each of the rules as above stated, refining the scope of Section 2283, injunctive relief was ultimately denied by reason of the application of principles of comity and the abstention doctrine. E.g., *Baines v. City of Danville, supra; Cooper v. Hutchinson, supra.*

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5 Section 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The question involved here is one of federal constitutional law, and the state statute involved is not of an uncertain nature. Neither is the state statute susceptible of a limiting construction, because it has already been construed three times by the Supreme court of Indiana and thrice held unconstitutional. In such circumstances the abstention doctrine does not apply. *Harman v. Forsenius,* 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50; *Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377; *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440; *McNeese v. Board of Education,* 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622; *City of Chicago v. Atchison, T. & S.F. R. co.,* 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174; *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 65 S.Ct. 152, 89 L.Ed. 101.

Just as the defunct legal posture of the Indiana recount statute makes clear that abstention is not appropriate, the special circumstances disclosed by the facts impel the conclusion that the active interposition of this Court is required. What defendants are threatening to do, and will do if not enjoined, constitutes an interference with the orderly processes of the recent election, and with the Constitutional prerogatives of the United States Senate. The plaintiff, as a candidate for reelection to that body, has a constitutional right to have the election contest, if there is to be one, held before the sole tribunal having jurisdiction in the premises, the Senate itself. It is essential to plaintiff's right that the integrity of the ballots cast at such election be preserved, i.e., that they be held in their original envelopes, with the seals intact, and that the integrity of the tally sheets, voting machines, and other paraphernalia of the election likewise be preserved until such time as they may be called for by the Senate, so

that no question may arise as to the character of the evidence which the Senate will be called upon to judge. Plaintiff's rights will be irreparably harmed if such evidence is compromised, for which there can be no adequate remedy at law. The harm to be avoided will take place immediately, if not enjoined. Like Humpty Dumpty, the seals on the ballots cannot be put back together again, if once destroyed, hence the frequent reason given for abstention—that all can be made right through state appellate procedures—does not apply.

We surmise that the defendant's argument here would be less heated if, for example, we had before us, instead of a purported recount commission appointed by the Superior Court of Marion County, a purported recount commission appointed by a Justice of the Peace of Beanblossom Township, Brown County, Indiana, directed by the Justice to open, inspect, and judge anew all of the ballots cast in the whole State for the office of United States Senator. But what would be the difference?

As was said by the Supreme Court of Indiana in *Beaman,* the statute involved was void *ab initio* and conferred no power upon any court to perform either a ministerial or a judicial act thereunder, as to "recounts" for legislative office. Consistently, therefore, there could be no difference at all between the legal standing of the defendant commissioners in this action, and the hypothetical Brown County commissioners. Thus considered, what we are here enjoining is not in any true sense a "proceeding" in a State court, but, more appropriately, a threatened invasion of the sanctity of the ballots by persons acting wholly without legal authority.

The respective motions to dismiss the action are therefore each denied, and a preliminary injunction will issue

forthwith, as prayed for by the plaintiff, upon his giving bond as provided in Rule 65(c), F.R.C.P., in the penal sum of $5,000.00.

Dated this 19th day of December, 1970, as of December 17, 1970, at 5:45 P. M., pursuant to the oral announcement of the Court's decision and order at the conclusion of the hearing on the prayer for a preliminary injunction.

Certified: A true copy
Arthur J. Beck, Clerk
U. S. District Court
Southern District of Indiana

By
Deputy Clerk

/s/ WILLIAM E. STECKLER
William E. Steckler

/s/ S. HUGH DILLIN
S. Hugh Dillin

Judges of the United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE,	)	
	)	
vs	)	NO. IP 70-C-694
	)	
RICHARD L. ROUDEBUSH, et al.	)	

Entry for December 15, 1970
Honorable S. Hugh Dillin, Judge

This cause comes before the Court upon the motion of Theodore L. Sendak, Attorney General of the State of Indiana, for leave to intervene as a party defendant herein.

The Court having read and considered said motion and being fully advised now grants said motion.

Comes now said intervening defendant and files his motion to dismiss the cause of action.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE, Plaintiff,	)	
vs	)	NO. IP 70-C-694 CAUSE
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER, Defendants,	)	
and	)	
THEODORE SENDAK, Attorney General of Indiana, Intervening Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Theodore L. Sendak, Attorney General of the State of Indiana, intervening Defendant, hereby appeals to the Supreme Court of the United States from the order of this Court entered in this cause on December 17, 1970, denominated a preliminary injunction and purporting to continue in full force and affect, the *ex parte* temporary restraining order entered by this Court on December 3, 1970, enjoining any action whatsoever to effectuate any of the procedures

for conducting a recount for the office of the United State Senator for the State of Indiana, according to the applicable statutes of the State of Indiana pending or otherwise, anywhere in the State of Indiana.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

/s/ THEODORE L. SENDAK
Theodore L. Sendak
Attorney General of Indiana

/s/ WENDELL C. HAMACHER
Wendell C. Hamacher
Deputy Attorney General

/s/ WILLIAM F. THOMPSON
William F. Thompson
Assistant Attorney General

Attorneys for Theodore L. Sendak, Attorney General of the State of Indiana, Intervening Defendant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal has been served on the following attorneys of record in the above-captioned cause by depositing in the United States Mail a copy of same, first-class postage prepaid, this 18th day of December, 1970.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE,

vs

NO. IP 70-C-694

RICHARD L. ROUDEBUSH,
SAMUEL J. WALKER,
JOHN R. HAMMOND,
DUGE BUTLER,

THEODORE SENDAK, Attorney General of Indiana,

Entry for December 18, 1970
Honorable S. Hugh Dillin, Judge

The Court now Overrules the petition of the Attorney General of the State of Indiana to stay interlocutory order.

INDIANA RECOUNT STATUTE

29-5401. Elections—Right of candidate to recount of votes.—Any candidate for any public office voted upon at any election held within the state of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the conditions and in the manner and with the effect as in this article [§§ 29-5401—29-5417] provided. [Acts 1945, ch. 208, § 324, p. 680.]

29-5402. Right of recount—Candidates entitled—Application to voting precincts.—The right of recount provided in this article [§§ 29-5401—29-5417] shall be

available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipal, county, district, judicial, legislative, and state elective office and candidates for membership in the house of representatives and in the senate of the United States; and such right of recount may by and candidate be exercised with respect to one [1] or several or all of the voting precincts in which votes were cast for the office for which he was a candidate. [Acts 1945, ch. 208, § 325, p. 680.]

29-5403. Petition for recount—Verification—Filing—Cross-petition by candidate elected—Time in which cross-petition must be filed.—The candidate desiring a recount of votes shall file a verified petition or petitions therefor, as the case may be, in the circuit or in a superior court of the county or counties in which is located or are located the voting precinct or precincts in which he desires a recount of the votes cast for the office for which he or she was a candidate at such election, or before the judge of any such court in vacation and each such petition shall specify the voting precinct or precincts within the county in which the petition is filed in which such recount is desired; such petitions for the recount of votes cast at an election shall be filed within fifteen [15] days after the day on which such election was held: Provided, That any candidate, who, on the face of the election returns is elected to any office at such election, shall be permitted to file a cross-petition or cross-petitions for a recount within twenty-five [25] days after the day on which said election is held and each such cross-petition shall specify the voting precinct or precincts within the county in which the cross-petition is filed in which such recount is desired. If a petition for recount is filed for an office for which

voters in more than one county vote a cross-petition for a recount may be filed in a county or counties in addition to the one in which the first petition was filed: Provided, That such cross-petition or cross-petitions for a recount shall be filed within twenty-five [25] days after the day on which said election is held and that such cross-petition or cross-petitions shall ask for a recount of all votes cast for such office in the second or more counties; Provided, further, That in the case of a state-wide elective office, if more than two [2] counties are involved through petition or cross-petition, the petitioner and cross-petitioner shall each bear ten per cent [10] of the costs occasioned by the recount and the remainder of said cost shall be appropriated and paid from the general fund as other expenditures of the state of Indiana, notwithstanding any other provisions of the Acts of 1945, chapter 208. If on either such day the court shall be in vacation the petition or cross-petition shall be deemed duly filed in time if filed in the office of the clerk of the court, but no such petition shall be granted and no recount ordered until after such twenty-fifth day following such election unless the defendant or defendants to the petition or petitions file a written waiver or waivers of their right to file a cross-petition or cross-petitions as provided in That the filing of a cross-petition is discretionary and not obligatory and failure to file either a cross-petition or an answer shall not be construed as an admission of the truth of the allegations of the petition for a recount nor shall it give rise to any presumption in favor thereof. [Acts 1945, ch. 208, § 326, p. 680; 1961, ch. 313, § 2, p. 861.]

29-5404. Candidates may join in petition for recount—Consolidation of petitions for recount.—Two [2] or more

candidates for the same or different offices voted upon at the same election may join in such petition or petitions for recount. If more than one [1] petition for recount is filed in any county within fifteen [15] days following an election, whether in the same court of such county or not, such petitions shall be ordered consolidated under the petition first filed, and if a transfer of petitions from one court of such county to another court of such county is necessary to effect such consolidation such transfer shall on motion be ordered by the court in which the subsequent petition or petitions were filed, or the judge thereof in vacation. [Acts 1945, ch. 208, §327, p. 680.]

29-5405. Petition for recount—Contents—Term "contest" defined—Amendment of petition.—Each such petition shall state the office and the precinct or precincts within the county in respect of which the petitioner desires a recount; that he was a candidate at such election for such office and that the office was voted upon in the precinct or precincts specified; the name and post-office address of petitioner's opposing candidate or candidates; that the petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that the petitioner desires to contest said election in respect of said office, or that the petitioner desires to prepare for a contest in respect of such office which he has reason to believe will be instituted against him; and that he desires a recount of all of the votes cast for such office in such precinct or precincts. The term "contest" as used in this section shall include all forms of contest herein or hereafter recognized as appropriate means for contesting title to a public office. The court in which such petition is filed or the judge thereof in vacation may allow such petition to be

amended at any time upon such terms and conditions as the court or judge may order. [Acts 1945, ch. 208, § 328, p. 680.]

29-5406. Cross-petition — Contents — Amendment of cross-petition. — Each such cross-petition shall state the office and the precinct or precincts within the county in respect of which the cross-petitioner desires a recount; that he was a candidate at such election for such office and that the office was voted upon in the precinct or precincts specified; the name and post-office address of the cross-petitioner's opposing candidate or candidates; that the cross-petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such elecion in such precinct or precincts were not correctly counted and returned; that he desires a recount of all of the votes cast for such office in such precinct or precincts. The court in which such cross-petition is filed or the judge thereof in vacation may allow such cross-petition to be amended at any time upon such terms and conditions as the court or judge may order. [Acts 1945, ch. 208, § 329, p. 680.]

29-5407. Notice of filing and pendency of petition—Duty of clerk to issue notice—Duty of sheriff.—Upon the filing of such petition, the clerk shall issue a notice of such filing and pendency of such petition to the opposing candidate or candidates and deliver the same to the sheriff or sheriffs of the county or counties in which such opposing candidate or candidates reside; and said sheriff or sheriffs shall immediately serve the same upon such opposing candidate or candidates in person or by leaving a copy at his or their last and usual place of residence and shall make immediate return of such service. [Acts 1945, ch. 208, § 330, p. 680.]

29-5408. Bond for payment of costs.—Each petitioner shall furnish a cash deposit or file an undertaking with corporate surety to the approval of the court for the payment of all costs of such recount, the minimum amount of which shall be one hundred [$100] dollars. Should the number of precincts to be counted exceed ten [10], the amount of the deposit or bond, as the case may be, shall be increased by ten dollars [$10] for each and every precinct in excess of ten [10]. Any unexpended balance remaining in any deposit after payment of all the costs occasioned by the recount proceedings shall be returned to the depositor: Provided, That where the petition is joint a joint undertaking may be furnished: Provided, however, That in the event a cross-petition is filed then the petitioner or petitioners and the cross-petitioner or cross-petitioners shall either furnish cash deposits or file undertakings with corporate surety to the approval of the court for the payment of his or their proportionate share of the cost of such recount as hereinafter provided: Provided, That where the cross-petition is joint a joint undertaking may be furnished. [Acts 1945, ch. 208, § 331, p. 680.]

29-5409. Granting petition and cross-petition—Appointment of recount commission.—Upon the filing of such petition and undertaking, the court or the judge thereof in vacation shall, upon the expiration of twenty-five [25] days after such election and upon proof of service of said notice or notices, grant such petition and cross-petition or cross-petitions as may have been filed and order the recount of such votes in such precinct or precincts, and if there is a consolidation of such petitions and cross-petitions, the court shall by consolidated order grant such consolidated petitions and cross-petitions and shall order a consolidated recount of all votes in all pre-

cincts in such county specified and requested in such petitions and cross-petitions. In either case the court or the judge thereof in vacation shall appoint a recount commission of three [3] members to make the recount or recounts ordered, and the commission shall in the same process recount all of the votes ordered recounted. [Acts 1945, ch. 208, § 332, p. 680.]

29-5410. Recount commission—Qualifications of members—Compensation.—If any of the votes to be recounted were cast by means of voting machines, one [1] member of the recount commission shall be a competent mechanic who is familiar with such voting machines. All of such commissioners shall be voters, qualified to vote at such election and two [2] of such commissioners shall be selected from the two [2] opposite political parties which cast the highest and next highest votes in this state for secretary of state at the last preceding general election. Each member of the commission shall receive ten dollars [$10.00] for each day while actually engaged in making such recount. The cost of such recount shall be paid by each petitioner or cross-petitioner, as hereinafter provided. [Acts 1945, ch. 208, § 333, p. 680.]

29-5411. Duty of commission—Watchers—Representatives of press entitled to attend.—On a day, not sooner than five [5] days after the recount is ordered, and at a place to be fixed by order of the court, such commission shall convene and commence such recount and shall expeditiously complete the same. Each candidate affected by such recount shall be entitled to have a watcher present at such recount and shall himself have the right to be present. Representatives of the press shall also be entitled to attend such recount. [Acts 1945, ch. 208, § 334, p. 680.]

29-5412. Duty of clerk when order of recount is made and entered by court.—On the day when the order of recount is made and entered by the court, the clerk of the circuit court shall, by registered United States mail, mail a certified copy of such order to each opposing candidate named in such petition at the address therein given, and shall tax the cost thereof to the petitioner. [Acts 1945, ch. 208, § 335, p. 680.]

29-5413. Protection of ballots, voting machines, tally sheets and other papers—Duty of court.—The court shall by order impound, and provide for the protection of all ballots and voting machines used at such election for casting votes for such office or offices in such precinct or precincts, together with all tally sheets relating thereto and all lists of the names and addresses of all persons registered by the clerk as having voted for such office or offices, and shall make the same available to said recount commission or to any contest commission appointed pursuant to section 351 [§ 29-5603] (a) (b) and (c) of this act [chs. 28-60 of this title]. [Acts 1945, ch. 208, § 336, p. 680; 1961, ch. 313, § 3, p. 861.]

29-5414. Completion of recount—Certificate of commission—Filing—Duty of clerk—Effect of certificate—Procedure when recount for office of governor, lieutenant-governor, and members of general assembly.—When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the

circuit court. The clerk shall enter such certificate in the order book of such court.

Except for the offices of governor, lieutenant-governor, and members of the general assembly, such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such recount certificates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any contest or other preceeding [proceeding] in which there is an issue as to the votes cast at such election for such office or offices.

Upon a recount for the office of governor or lieutenant-governor, each clerk of the circuit court shall, on the day following the completion of the recount, make out, at full length, two [2] certified statements, under the seal of the clerk of the circuit court, of the number of votes each candidate received; one [1] of which he shall transmit to the speaker of the house of representatives of the next general assembly, by its senator or representative, who shall deliver the same to such speaker on the first day of the session and the other certified statement shall be transmitted by registered mail to Indianapolis, directed to said speaker, and to the care of the secretary of state, by whom the same shall be delivered to the speaker on the first day of the session.

If a recount is had in respect to votes cast for senator or representative in the general assembly, each clerk of the circuit court, on the day following the completion of the recount, shall make and certify two [2] statements showing the total number of votes each candidate received; he shall transmit one [1] such certified state-

ment to the person having the highest number of votes for senator or representative, and shall transmit one [1] certified statement to the presiding officer of the house in which the successful candidate is to be seated, directed to the care of the secretary of state, by whom the same shall be delivered to the said presiding officer on the first day of the next session of the general assembly. The said certified statement shall be referred by such presiding officer for such action as that body may find appropriate: Provided, however, That when two [2] or more counties compose a district to elect a senator or representative, the clerks of such counties shall meet on Wednesday next following the day such recount is completed between the hours of one [1] and six [6] of the afternoon, at the courthouse of the oldest county in such district, where they shall compare the recount certificates filed with them and shall jointly make out and certify two [2] statements showing the total number of votes each candidate received and shall transmit the same as provided herein.

The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted as herein provided for the purpose of referring the information therein contained to the appropriate authorities. [Acts 1945, ch. 208, § 337, p. 680; 1961, ch. 313, § 4, p. 861.]

29-5415. Recount in respect to office for which votes were cast in all voting precincts of state—Duty of clerk to certify recount vote to secretary of state—Duty of secretary of state.—If a recount is had in respect to an office for which votes were cast in all voting precincts of the state, except governor and lieutenant-governor, or in more

than one [1] county, except members of the general assembly, the clerk of the circuit court where such recount was had shall determine whether the votes as shown by such recount certificates differ from the votes in such precinct or precincts as the same had been returned to, and tabulated by the county canvassing board, and if he finds there is such difference he shall make his certificate showing the total vote in such county for such office for each candidate as corrected in accordance with the votes shown by such recount certificate and shall forthwith transmit the same to the secretary of state who then shall tabulate the vote for such office from such county in accordance with such certificate from such clerk; and if the secretary of state shall previously have included in his tabulations votes cast for such office as returned by such county convassing board he shall correct such tabulation, in accordance with such certificate from such clerk and the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office. [Acts 1945, ch. 208, § 338, p. 680; 1961, ch. 313, § 5, p. 861.]

29-5416. Recount in respect to office voted upon in single county, city or smaller unit—Duty of clerk.—If the office in respect to which such recount is had was voted upon only in a single county, except members of the general assembly, city, or smaller unit, then the clerk of the circuit court shall determine whether the total tabulation of all votes for such office as made by the county canvassing board authorized to make such total tabulation is affected by the results of such recount as shown by such recount certificate, and if it is, then such clerk shall

make his certificate showing the correct total vote for such office in accordance with such recount certificate and shall transmit such certificate to the county election board or such other officer as may be authorized by this act [chs. 28-60 of this title] to issue a certificate of election or commission for such office; and the candidate shown by such certificate of the clerk to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office, notwithstanding one may have been issued upon a previous return or certificate of the total votes cast for such office. [Acts 1945, ch. 208, § 339, p. 680; 1961, ch. 313, § 6, p. 861.]

29-5417. Payment of costs of recount—Time.—In those cases in which no cash deposit is made as provided in section three hundred and thirty-one [§ 29-5408], the petitioner or petitioners shall pay all of the costs occasioned by the recount to the clerk of the circuit court within ten [10] days after the recount has been finally completed: Provided, however, That in the event a cross-petition or cross-petitions are filed then the party or parties filing such cross-petition or cross-petitions shall pay to the clerk of the circuit court of the county in which such recount is had within ten [10] days after the recount is completed all of the costs occasioned by the recount of votes in the precinct or precincts which have been designated in his or their respective cross-petition or cross-petitions and the petitioner or petitioners shall be relieved of these costs of the recount. [Acts 1945, ch. 208, § 340, p. 680.]